

## **CHAPTER 7**

### **CONTINUING RESOLUTION AUTHORITY AND FUNDING GAPS**

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## **CHAPTER 7**

### **CONTINUING RESOLUTION AUTHORITY AND FUNDING GAPS**

#### **I. INTRODUCTION.**

#### **II. REFERENCES.**

- A. Office of Management and Budget Circular A-11, Section 123, Apportionments Under a Continuing Resolution (2002) [hereinafter OMB Cir. A-11].
- B. General Accounting Office, Office of General Counsel, Principles of Federal Appropriations Law, ch. 8, Continuing Resolutions (2d ed. 1992) (often referred to as the “GAO Red Book”).
- C. Continuing Resolution General Guidance, (OASA-FMC, August 1998) available at <http://www.asafm.army.mil/pubs/cra/cra0898.doc> (Appendix C of this outline).

#### **III. DEFINITIONS.**

- A. Continuing Resolution.
  - 1. The Congressional resolution, in the absence of an appropriation act, providing authority for Agencies to continue current operations. Such continuing resolutions are subject to OMB apportionment in the same manner as appropriations DOD 7000.14-R, DOD Financial Management Regulation, vol. 1, Definitions.
  - 2. [A]n interim appropriation to provide authority for specific ongoing activities in the event that regular appropriations have not been enacted by the beginning of the fiscal year or the expiration of the previous CRA. A CRA has a fixed life. Defense Finance and Accounting Service--Indianapolis Regulation 37-1, Finance and Accounting Policy Implementation, (Jan. 2000), para. 080401. [hereinafter DFAS-IN 37-1] (*available at* <https://dfas4dod.dfas.mil/library>).

- B. Funding Gap. A funding gap occurs when previous budget authority expires and there exists no regular appropriations act or continuing resolution. DFAS-IN 37-1, para. 0805.

#### IV. GOVERNMENTAL OPERATIONS DURING FUNDING GAPS.

##### A. Continued Operations - Potential Antideficiency Act Violations.

1. The Comptroller General has opined that permitting federal employees to work after the end of one fiscal year and before the enactment of a new appropriations act or a Continuing Resolution violates the Antideficiency Act (ADA). Representative Gladys Noon Spellman, B-197841, March 3, 1980 (unpub.).
2. The Attorney General has opined that absent an appropriations act or a Continuing Resolution, executive agencies must take immediate steps to cease normal operations. Opinion of the Attorney General, Apr. 25, 1980 (Appendix A).
3. In anticipation of a potential funding gap, the Clinton Administration requested updated guidance on the scope of permissible government activity. In response, the Department of Justice issued what is known as the "Dellinger Memo," which reemphasized the restricted level of allowable government activity. The Memo also noted, however, that a lapse in appropriations will not result in a total "government shut-down." DOJ Memorandum for Alice Rivlin, Office of Management and Budget, Aug. 16, 1995 (Appendix B).

##### B. Continued Operations - Permissible Activities.

1. The Office of Management and Budget (OMB) issues guidance concerning actions to be taken by agencies during funding gaps.
  - a. Agencies must develop contingency plans to conduct an orderly shutdown of operations.

- b. During a funding gap, agencies may continue:
  - (1) Activities otherwise authorized by law, e.g., activities funded with multi-year or no-year appropriations;
  - (2) Activities authorized through extraordinary contract authority. See, e.g., 41 U.S.C. § 11 (Food and Forage Act).
  - (3) Activities that protect life and property. See, e.g., 31 U.S.C. § 1342.
  - (4) Activities necessary to begin phase-down of other activities. See Attorney General Opinion, Apr. 25, 1980 (Appendix A).
- 2. In 1990 Congress amended 31 U.S.C. § 1342, to restrict the authority of agencies to cite the safety of life or the protection of property as the basis for continuing operations. Congress excluded "ongoing, regular functions of government the suspension of which would not imminently threaten the safety of human life or the protection of property" from the scope of permissible activities that may be continued during a funding gap. See Appendix C.
- 3. DFAS Guidance.
  - a. DFAS-IN 37-1, para. 0805, provides the following guidance concerning operations during a funding gap:
    - (1) Obligations may continue in the new fiscal year for minimum mission essential business.
    - (2) Neither prior year unexpired funds of multi-year appropriations nor revolving funds are impacted by the absence of a new appropriation or a CRA.

- b. DFAS-IN 37-1, para. 1604, provides additional details concerning disbursements permitted during funding gaps. Such disbursements may be made:
  - (1) To liquidate prior-year obligations;
  - (2) To liquidate new obligations for unexpired multi-year appropriations;
  - (3) To liquidate obligations for revolving funds and trust funds (no year) while cash balances exist; and,
  - (4) To liquidate obligations made during a previous CRA.
- 4. In September 1995, DOD issued detailed guidance addressing what activities the military departments and other DOD agencies could perform during the absence of appropriations (*i.e.*, a funding gap). This information as well as additional guidance can be found in Continuing Resolution Authority General Guidance (OASA-FMC, August 1998, found at <http://www.asafm.army.mil/pubs/cra/cra0898.doc> (See Appendix D)).
  - a. Activities that could continue during the funding gap:
    - (1) Units and the administrative, logistical, and maintenance functions required in support of major contingency tasking;
    - (2) Units and personnel supporting ongoing international treaties, commitments, essential peacetime engagement and counterdrug operations;
    - (3) Units and personnel preparing for or participating in operational exercises;

- (4) Functions or activities necessary to protect life and property or to respond to emergencies;<sup>1</sup>
- (5) Educational activities deemed necessary for immediate support of permissible activities;
- (6) Educational activities not otherwise allowed if undertaken by active duty military personnel for other active military personnel only;
- (7) Negotiation, preparation, execution, and administration of new/existing contracts for permissible activities/functions;<sup>2</sup>
- (8) Litigation activities associated with imminent legal action, only so long as courts and administrative boards remain in session;
- (9) Legal support for any permitted activities;
- (10) MWR activities to the extent operated by NAF personnel; and
- (11) Childcare activities, including Department of Defense Dependents Schools.

b. Activities required to be suspended during the funding gap:

- (1) Basic, skill, and qualification training which will obligate current FY funds;

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<sup>1</sup> Among the activities exempted from the "shut-down" include: fire protection, physical security, law enforcement, air traffic control and harbor control, utilities, housing and food services for military personnel, trash removal, and veterinary services in support of exempt functions (i.e., food supply and service inspections).

<sup>2</sup> For contract actions not within the scope of the original contract and that are in direct support of permissible activities, the contracting officer will cite one of the following three authorities in support of the new obligation: (1) the Constitution as interpreted by Attorney General opinions for general support of National Security operations, (2) 41 U.S.C. § 11 for obligations covered by the Food and Forage Act, and (3) 31 U.S.C. § 1342 for obligations for protection of life and property against imminent danger.

- (2) Military Personnel Selection Boards and Administrative Boards;
- (3) Routine medical procedures (including vaccinations) in DOD medical facilities for non-active duty personnel, and;
- (4) PCS moves and TDY travel for active duty, reserve, and civilian personnel engaged in otherwise non-exempt activities using current FY funding.

5. Funding Gap Issues.

- a. Agencies generally cannot predict whether a funding gap will occur or estimate its duration. Consequently, it is difficult for agencies to plan for such gaps.
- b. Efficient operation of government is clearly compromised. See General Accounting Office, Government Shutdown: Permanent Funding Lapse Legislation Needed, GAO/GGD-91-76, B-241730, June 6, 1991; General Accounting Office, Funding Gaps Jeopardize Federal Government Operations, No. PAD-81-31, Mar. 3, 1981.
- c. What if we incur unauthorized obligations? See, e.g., Department of Defense Appropriations Act, 1993, § 9049, Pub. L. No. 102-396, 106 Stat. 1876 ("All obligations incurred in anticipation of this Act are hereby ratified and confirmed if otherwise in accordance with this Act.").

## V. CONTINUING RESOLUTIONS.

### A. General Legal Implications of Continuing Resolutions.

- 1. If Congress fails to pass, or the President fails to sign, an appropriation act before 1 October, a funding gap occurs unless Congress passes, and the President signs, interim legislation authorizing executive agencies to continue incurring obligations. This interim legislation is referred to as a Continuing Resolution. It is a statute that has the force and effect of law. See Oklahoma v. Weinberger, 360 F. Supp. 724 (W.D. Okla. 1973).



2. Comparison of Continuing Resolutions with Appropriation Acts.
  - a. Appropriation acts appropriate specified sums of money.
  - b. Continuing Resolutions are temporary appropriation acts that normally appropriate "such amounts as may be necessary" for continuing projects or activities at a certain "rate for operations."
3. The Continuing Resolution for FY 2006 provided:

*Resolved by the Senate and House of Representatives of the United States of America in Congress assembled,* That the following sums are hereby appropriated, out of any money in the Treasury not otherwise appropriated, and out of applicable corporate or other revenues, receipts, and funds, for the several departments, agencies, corporations, and other organizational units of Government for the fiscal year 2006, and for other purposes, namely:

Sec. 101. . . . a. Such amounts as may be necessary under the authority and conditions provided in the applicable appropriations Act for fiscal year 2005 for continuing projects or activities (including the costs of direct loans and loan guarantees) that are not otherwise specifically provided for in this joint resolution, that were conducted in fiscal year 2005, and for which appropriations, funds, or other authority would be available in the following appropriations Acts:

(2) the Department of Defense Appropriations Act, 2006

\* \* \*

H.J. Res. 68 (hereinafter referred to as the FY 2006 Continuing Resolution) (emphasis added).

B. Availability of Appropriations as to Purpose under a Continuing Resolution.

1. Continuing Resolutions provide interim funding for projects or activities conducted in the prior fiscal year. To determine whether a given program or activity is covered by the CR, the Comptroller General will look to prior year legislation and its history. Special Defense Acquisition Fund, B-214236, 66 Comp. Gen. 484 (1987). Generally, the scope of a Continuing Resolution's applicability is quite broad:

Sec. 105. Appropriations made and authority granted pursuant to this joint resolution shall cover all obligations or expenditures incurred for any project or activity during the period for which funds or authority for such project or activity are available under this joint resolution.

FY 2006 Continuing Resolution.

2. New Starts. Continuing Resolutions generally do not allow agencies to initiate new programs, or expand the scope of existing programs, projects, and activities. For example, the FY 2006 Continuing Resolution provided, in part:

Sec. 102(a). No appropriation or funds made available or authority granted pursuant to section 101 for the Department of Defense shall be used for: (1) the new production of items not funded for production in fiscal year 2005 or prior years; (2) the increase in production rates above those sustained with fiscal year 2005 funds, or (3) the initiation, resumption, or continuation of any project, activity, operation, or organization . . . for which appropriations, funds, or other authority were not available during the fiscal year 2005. . . .

3. To determine if a program is a new “project or activity,” the Comptroller General has looked at whether the agency had prior authority to carry out activities specifically identified in newly enacted legislation. Chairman, Nat'l Advisory Council on Extension and Continuing Educ., B-169472, 52 Comp. Gen. 270 (1972) (National Advisory Council’s review of certain programs not a new project or activity).

4. The Assistant Secretary of the Army (Financial Management & Comptroller) provided guidance in Continuing Resolution General Guidance, (OASA-FMC, August 1998) at pages 4-6, available at <http://www.asafm.army.mil/pubs/cra/cra0898.doc> regarding “new starts”:
- a. Military Personnel Appropriations. New starts for Military Personnel include new entitlements and new recruitment bonuses, which were not approved in previous legislation, and are not permitted. An example of a new start is the payment of adoption expenses approved for the first time in FY89.
  - b. Operation and Maintenance (O&M). Continuation of normal operations is authorized. Obligations may be incurred for essential operating expenses, including expenses to cover annual contracts which are regularly awarded and obligated in full at the beginning of the fiscal year.
  - c. Modifications to O&M programs are generally permitted; they are not considered new starts or scope increases as they do not change the overall purpose of the program. O&M-funded minor construction is not considered a new start and is permitted. An example of an increase in scope of an ongoing program which would not be permitted under CRA is the inception of the National Training Center, which was initiated as a new phase of the Army’s training program.
  - d. Procurement and Research, Development, Test and Evaluation (RDTE) Appropriations. Generally, a CRA allows previously approved programs to be released at rates sustained during the previous fiscal year. New start restrictions apply to the execution of new investment items not funded for production in the previous fiscal year. Items for which funding was provided in the previous year, or for which funding was provided in prior years and is still available for obligation (e.g., procurement items funded one or two years ago) are not considered new starts.

e. Military Construction Appropriations. Any project or activity for which an appropriation, fund, or other authority was not provided during the previous fiscal year is considered a new start and will not be initiated under CRA. Minor construction funded with Military Construction funds is considered a new start and may not be initiated under CRA. Planning and design is not considered a new start. Therefore, in general, only planning and design funds may be executed under CRA.

5. When the applicable appropriations act becomes law, expenditures made pursuant to the Continuing Resolution must be charged against the appropriations act:

Sec. 107. Expenditures made pursuant to this joint resolution shall be charged to the applicable appropriation, fund, or authorization whenever a bill in which such applicable appropriation, fund, or authorization is contained is enacted into law. FY 2006 Continuing Resolution.

C. Availability of Appropriations as to Time under a Continuing Resolution. A Continuing Resolution provides budget authority:

1. Until a fixed cut-off date specified in the Continuing Resolution;
2. Until an appropriations act replaces it; or
3. For an entire fiscal year, if no appropriations act is passed
4. The FY 2006 Continuing Resolution provided:

a. Sec. 106. Unless otherwise provided for in this joint resolution or in the applicable appropriations Act, appropriations and funds made available and authority granted pursuant to this joint resolution shall be available until whichever of the following first occurs:

(1) the enactment into law of an appropriation for any project or activity provided for in this joint resolution;

(2) the enactment into law of the applicable appropriations Act by both Houses without any provision for such project or activity; or

(c) November 18, 2005.

FY 2006 Continuing Resolution.

D. Availability of Appropriations as to Amount under a Continuing Resolution.

1. Current rate. Continuing Resolutions frequently authorize operations at the "current rate." "Current rate" is usually "the total amount of money which was available for obligation for an activity during the fiscal year immediately prior to the one for which the continuing resolution is enacted." This amount indicates "the level of spending which Congress desires for a program." General Accounting Office, Office of General Counsel, Principles of Federal Appropriations Law, ch. 8, Continuing Resolutions at p. 8-8 (2d ed. 1992) (hereinafter GAO, Principles).

a. Continuing Resolutions use the "current rate" to establish the upper limit at which agencies may continue to fund a project or activity. For example, the FY 2006 Continuing Resolution contained the following language:

- (1) Sec. 101(b) Whenever the amount that would be made available or the authority that would be granted for a project or activity under an Act listed in subsection (a) as passed by the House of Representatives as of October 1, 2005, is the same as the amount or authority that would be available or granted under the same or other pertinent Act as passed by the Senate as of October 1, 2005--(1) the project or activity shall be continued at a rate for operations not exceeding the current rate or the rate permitted by the actions of the House and the Senate, whichever is lower, and under the authority and conditions provided in applicable appropriations Acts for fiscal year 2005; or (2) if no amount or authority is made available or granted for the project or activity by the actions of the House and the Senate, the project or activity shall not be continued
- (2) (2) if the project or activity is included in the pertinent Act of only one of the Houses, the project or activity shall be continued under the appropriation, fund, or authority granted by the one House, but at a rate for operations not exceeding the **current rate** or the rate permitted by the action of the one House, whichever is lower, and under the authority and conditions provided in applicable appropriations Acts for fiscal year 2005. FY 2006 Continuing Resolution (emphasis added).

b. Comptroller General Interpretations.

- (1) One-year appropriation. When the program in question was funded by a one-year appropriation in the prior year, the current rate equaled the total funds appropriated for the program for the previous fiscal year. To the Hon. Don Edwards, House of Representatives, B-214633, 64 Comp. Gen. 21 (1984); In the Matter of CETA Appropriations Under 1979 Continuing Resolution Authority, B-194063, 58 Comp. Gen. 530 (1979).
- (2) Multi-year appropriations. When the unobligated balance can be carried over from the prior fiscal year (e.g., under a multi-year appropriation), the amount available under the Continuing Resolution equaled the amount available for obligation in the prior fiscal year (i.e., the "current rate") less any unobligated balance carried over into the present year. National Comm. for Student Financial Assistance-

Fiscal Year 1982 Funding Level, B-206571, 61 Comp. Gen. 473 (1982).

2. Apportionment. OMB apportions the funds appropriated by Continuing Resolutions. 31 U.S.C. § 1512. Congress often includes language in a Continuing Resolution, such as that used in the FY 2002 CR, to ease the normal apportionment requirements:

Sec. 108. Appropriations and funds made available by or authority granted pursuant to this joint resolution *may be used without regard to the time limitations for submission and approval of apportionments* set forth in section 1513 of title 31, United States Code, but nothing in this joint resolution may be construed to waive any other provision of law governing the apportionment of funds. FY 2006 Continuing Resolution (emphasis added).

3. High Initial Rates of Operation. Congress often prohibits agencies with high rates of operation early in the fiscal year from engaging in similar conduct during the life of the Continuing Resolution.

Sec. 109. Notwithstanding any other provision of this joint resolution, except section 106, for those programs that had high initial rates of operation or complete distribution of fiscal year 2005 appropriations at the beginning of that fiscal year because of distributions of funding to States, foreign countries, grantees or others, *similar distributions of funds for fiscal year 2006 shall not be made* and no grants shall be awarded for such programs funded by this joint resolution that *would impinge on final funding prerogatives*. FY 2006 Continuing Resolution (emphasis added).

4. Obligations incurred under Continuing Resolutions remain valid even if the appropriations finally passed by Congress are less than the amounts authorized by the Continuing Resolution. Treasury Withdrawal of Appropriation Warrants for Programs Operating Under Continuing Resolution, B-200923, 62 Comp. Gen. 9 (1982); Staff Sergeant Frank D.

Carr, USMC-Transferred Service Member-Dislocation Allowance,  
B-226452, 67 Comp. Gen. 474 (1988).

E. What Happens When Congress Decides to Reduce Government Operations -- The FY 1996 Continuing Resolution.

1. More Austere Conditions. In FY 1996 Congress required agencies to operate under more austere budgetary constraints during the Continuing Resolution period.
2. The Average of the Two Rates. The FY 1996 Continuing Resolution addressed the situation where the House version of an Act funded a project or activity at a different rate than the Senate version:

[Sec. 101](b) Whenever the amount which would be made available or the authority which would be granted under an Act listed in this section as passed by the House as of October 1, 1995, *is different* from that which would be available or granted under such Act as passed by the Senate as of October 1, 1995, the pertinent project or activity shall be continued at a rate for operations *not exceeding the average of the rates permitted by the action of the House or the Senate* under the authority and conditions provided in the applicable appropriations Act for the fiscal year 1995 . . . . FY 1996 Continuing Resolution (emphasis added).

3. The Average Rate Less Five Percent. During the life of the 1996 Continuing Resolution, agencies were required to reduce the rate of some operations by five percent.

Sec. 115. Notwithstanding any other provision of this joint resolution, except section 106, the rates for operation for any continuing project or activity provided by section 101 that have not been increased by the provisions of section 111 or section 112 *shall be reduced by 5 percent but shall not be reduced below the minimal level defined in section 111 or below the level that would result in a furlough.* FY 1996 Continuing Resolution (emphasis added).



4. Only One Version. Congress also provided fiscally restrictive language when addressing those situations where only one House of Congress had passed its version of an appropriations act as of 1 October 1995.

[Sec. 101](c) Whenever an Act listed in this section has been passed by only the House or only the Senate as of October 1, 1995, the pertinent project or activity shall be continued under the appropriation, fund, or authority granted by the one House *at a rate for operations not exceeding the current rate or the rate permitted by the action of the one House, whichever is lower*, and under the authority and conditions provided in applicable appropriations Acts for the fiscal year 1995. FY 1996 Continuing Resolution (emphasis added).

5. Minimal Level. The 104th Congress provided agencies funding so that they could continue certain FY 1995 activities at a "minimal level," that is, at 90% of the "current rate" for FY 1995.

Sec. 111. Notwithstanding any other provision of this joint resolution, except section 106, whenever an Act listed in section 101 as *passed by both the House and Senate as of October 1, 1995, does not include funding* for an ongoing project or activity for which there is a budget request, or whenever an Act listed in section 101 has been passed by only the House or only the Senate as of October 1, 1995, and an item funded in fiscal year 1995 is not included in the version passed by the one House, . . . the pertinent project or activity may be continued under the authority and conditions provided in the applicable appropriations Act for the fiscal year 1995 by increasing the rate for operations provided by section 101 to *a rate for operations not to exceed one that provides the minimal level* that would enable existing activities to continue. . . . For the purposes of the Act, the *minimal level means a rate for operations that is reduced from the current rate by 10 percent.*<sup>3</sup> FY 1996 Continuing Resolution

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<sup>3</sup> The second Continuing Resolution passed by the 104th Congress increased this decrement to 25 percent.

6. Furloughs. The initial 1996 Continuing Resolution offered agencies some relief from the "minimal level" rule. An agency could sustain operations at that rate of operations necessary to avoid furloughing Government employees, even if that rate exceeded the minimum level or rate otherwise required by the Continuing Resolution.

Sec. 112. *Notwithstanding any other provision of this joint resolution, except section 106, whenever the rate for operations for any continuing project or activity provided by section 101 or section 111 for which there is a budget request would result in a furlough of Government employees, that rate for operations may be increased to a level that would enable the furlough to be avoided. . . . FY 1996 Continuing Resolution (emphasis added).*

F. Relationship of a Continuing Resolution to Other Legislation.

1. A Continuing Resolution appropriates funds that are “not otherwise appropriated.” See e.g. Appendix E. The CRA does not apply to an agency program funded under another appropriation.
2. Specific inclusion of a program in a Continuing Resolution provides authorization and funding to continue the program despite expiration of authorizing legislation. Authority to Continue Domestic Food Programs Under Continuing Resolution, B-176994, 55 Comp. Gen. 289 (1975).

**VI. CONCLUSION.**